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No. 98-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Petitioner,

v.

MICHAEL GIBSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a federal employee's complaint for compensatory damages pursuant to Section 102 of the Civil Rights Act of 1991 should be dismissed for failure to exhaust administrative remedies because he did not use magic words at an earlier stage.

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REASONS FOR DENYING THE PETITION

I. The record in this case is undeveloped on the main issues presented

The district court never considered whether compensatory damages were available at the administrative level. See *Gibson v. Brown*, No. 96 C 223 (N.D. Ill., Oct. 3, 1996) (a copy of the district court's opinion is attached as Appendix B to the VA's cert. petition). The district court never considered the adequacy of the administrative procedure for awarding compensatory damages, nor the sufficiency of any request for general damages made by Gibson after his initial EEO complaint. The district court ruled that Gibson's failure to request compensatory damages in his initial EEO complaint undercut the "conciliatory purposes of the federal EEO structure," regardless of the actual availability of compensatory damages. *Gibson v. Brown,* No. 96 C 223 (N.D. Ill., Oct. 3, 1996), slip op. at 8-9, n.2 (VA's cert. petition, pp. 20a-23a).

The district court reasoned around the availability of compensatory damages at the administrative level because the VA took no position on the issue, apparently conceding Gibson's argument that such damages were not available. The VA did not explicitly argue the availability of compensatory damages at the administrative level until its response brief was filed in the Seventh Circuit. And then, the EEOC cases cited by the VA held that a request for compensatory damages could be made at any stage of the administrative process, contradicting the VA's position in the trial court that compensatory damages had to be requested in the initial EEO complaint.

In the trial court, the parties focused on Gibson's initial EEO complaint: the full administrative record was not submitted to the district court, and the parties did not analyze the record beyond the initial EEO complaint to determine whether Gibson had raised the issue of compensatory damages at some later stage in the proceedings. Fortuitously, the VA included a portion of the transcript of the investigation in its motion. The transcript reveals that when asked by the VA's investigator what he wanted, Gibson replied that he wanted, among other things, a "[m]onetary cash award." *Gibson v. Brown*, 137 F. 3d 992, 994 (7th Cir. 1998).

Thus, assuming *arguendo* that compensatory damages could be awarded at the administrative level, and assuming further that the burden was on Gibson to make the request, it affirmatively appears that Gibson made a sufficiently general request to include compensatory damages. The failure to request compensatory damages does not arise on this record. At best, the record is unclear on this issue, because neither party thought to submit the full administrative record to the district court. The burden was on the VA to demonstrate that Gibson failed to exhaust his administrative remedies, and the record in this case is inadequate to carry the VA's burden.

In addition, the record in this case is undeveloped concerning the adequacy of the administrative remedy. For example, when the VA finally revealed that compensatory damages were available at the administrative level, the EEOC cases cited by the VA indicated that one of the requirements for receiving an award of compensatory damages was "objective evidence" of pain and suffering. See *Simkins v. Runyon*, 1995 WL 597567 *3,

EEOC Appeal No. 01942339 (September 28, 1995). Yet Section 102 of the Civil Rights Act of 1991 does not require "objective evidence" of pain and suffering in order for a victim of discrimination to recover compensatory damages. 42 U.S.C. § 1981a. Again, it was the VA's burden to show the adequacy of the administrative remedy, but the record is largely silent on this issue.

The dispositive issue in this case is whether a federal employee fails to exhaust his administrative remedies by failing to request compensatory damages during agency processing of a discrimination claim. But the full administrative record was not made a part of the record in this case, and the fragmentary record available indicated that Gibson did make a general request for a "monetary cash award." Gibson submits that the failure to request compensatory damages does not arise on this record, and the facts concerning the adequacy of the administrative remedy are not well developed. For these reasons, this case is an inappropriate vehicle for the sweeping precedent sought by the Solicitor General.

II. The Gibson and Fitzgerald cases are distinguishable

The VA argues that the Fifth and Seventh Circuits are in conflict over the availability of compensatory damages at the administrative level, but the conflict is more apparent than real. In *Fitzgerald*, a pharmacy technician for the VA complained of harassment by a pharmacist. 121 F.3d 203, 205. After an investigation, the VA made an "offer of full relief," promising to provide Fitzgerald with a harassment free environment, to ensure that Fitzgerald would not have to work the

same shifts as his harasser, and to discipline Fitzgerald's harasser. 121 F.3d at 205. The VA did not offer compensatory damages, nor did it acknowledge that discrimination occurred. 121 F.3d 205, 210. However, the VA did invite Fitzgerald to call the director of the medical center to discuss the offer. 121 F.3d at 208.

Fitzgerald failed to discuss the offer with the director, and failed to respond to the offer of full relief. 121 F.3d at 208-09. When the VA dismissed his complaint, Fitzgerald appealed to the EEOC, but he failed to raise the issue of compensatory damages in his appeal. 121 F.3d at 205-09. The EEOC affirmed the VA's dismissal, and Fitzgerald filed suit in federal district court. 121 F.3d at 205. The district court found that the VA's offer fully responded to Fitzgerald's claims, and that Fitzgerald's rejection of the offer of full relief constituted a failure to exhaust his administrative remedies. 121 F.3d at 206. Fitzgerald appealed from the dismissal of his complaint. 121 F.3d at 205-06.

The Fifth Circuit Court of Appeals affirmed the dismissal of Fitzgerald's complaint, holding that "administrative agencies may *offer* compensatory damages for emotional injury to federal employees pursuing a Title VII claim." 121 F.3d at 207 (emphasis added). The *Fitzgerald* Court emphasized the purpose of the administrative process in encouraging conciliation and settlement, and the breadth of the delegation by Congress to the EEOC in issuing rules and regulations:

> We think that this mandate, as described in § 2000e-16(b), is sufficiently broad to allow the EEOC to *offer—or to certify or approve an administrative agency's offer* of full relief that includes compensatory damages for emotional injuries.

121 F.3d at 207 (emphasis added). The *Fitzgerald* Court neither considered nor decided any issue of sovereign immunity.

Parenthetically, the *Fitzgerald* Court commented that where federal employees suffer harm that may be remedied by compensatory damages, it was appropriate for the EEOC to grant such relief; the Court did not believe that "Congress would have created an administrative process capable of providing only partial relief." 121 F.2d at 207. Of course, that is precisely what Congress did: The Equal Employment Opportunity Act of 1972, which included what is now § 2000e-16(b), allowed only "equitable" remedies, and it was not until the Civil Rights Act of 1991 that compensatory damages became available. See *Landgraf v. USI Film Products*, 511 U.S. 244, 252-53 (1994); *Crawford v. Babbitt*, 148 F.3d 1318, 1324 (11th Cir. 1998).

The Fifth Circuit also commented that the employee bears the initial burden of notifying his or her agency of the specific relief sought, and that a complainant "may only receive relief for that which he asks." 121 F.3d at 208. The Court cited no authority for these propositions, and EEOC regulations seem to hold the opposite. The regulation concerning original EEO complaints requires precise information as to the identities of the parties and the factual basis for the claim, but the regulation is silent as to requests for relief. See 29 C.F.R. § 1614.106. And the regulations charge both the employing agency and the EEOC with a duty to afford victims of discrimination "full relief," regardless of what the complainant writes in the "corrective action"

box on the initial EEO complaint form. See 29 C.F.R. § 1614.501 and Appendix A to Part 1613.

By contrast, in *Gibson*, an accountant for the VA complained of intentional discrimination in his nonselection to a supervisory accountant position. 137 F.3d 992, 993. When the VA found no discrimination, Gibson appealed to the EEOC, and the EEOC reversed the VA's decision, finding that the VA discriminated against Gibson in the promotion decision. 137 F.3d at 993. The EEOC ordered the VA to promote Gibson and issue backpay, but the EEOC awarded no compensatory damages to Gibson. 137 F.3d at 994. When the VA failed to comply timely with the EEOC order, Gibson filed suit in federal district court seeking enforcement of the order and compensatory damages. 137 F.3d at 994.

While the case was pending in district court, the VA complied with the EEOC order, largely mooting Gibson's enforcement claim. 137 F.3d at 994. The district court interpreted Gibson's request for compensatory damages as an entirely new claim of discrimination, and dismissed it for failure to exhaust administrative remedies. 137 F.3d at 994. Gibson appealed the dismissal. 137 F.3d at 994.

The Seventh Circuit reversed the dismissal of Gibson's complaint, holding that "the EEOC may not *order* the government to pay compensatory damages." 137 F.3d at 998 (emphasis added). The *Gibson* Court focused on the binding force of EEOC adjudication against federal agencies, and found, as a matter of sovereign immunity as well as statutory construction, that

> the statutory scheme promulgated by Congress does not allow the EEOC to issue what

> would be *nonappealable awards* of compensatory damages; compensatory damages are awarded within the jury system established by the statute.

137 F.3d at 996 (emphasis added). Since the EEOC lacked authority to order the VA to pay compensatory damages, Gibson exhausted his administrative remedies and could pursue his request for compensatory damages in district court. 137 F.3d at 996-98.

Thus, whereas *Fitzgerald* involved a failure to exhaust administrative remedies by rejecting an offer of full relief, *Gibson* involved a full adjudication of a discrimination claim with no award of compensatory damages to the victim. Whereas the *Fitzgerald* Court held that administrative agencies may voluntarily offer compensatory damages to complainants, the *Gibson* Court held that the EEOC may not force agencies to pay compensatory damages without recourse to a jury trial. And whereas *Gibson* addressed the sovereign immunity issue, *Fitzgerald* did not. See also *Crawford v. Babbitt*, 148 F.3d 1318, 1324-25 (11th Cir. 1998) (distinguishing *Gibson* from *Fitzgerald* on issue of sovereign immunity).

The Solicitor General gives short shrift to sovereign immunity in his petition for a writ. The full extent of the VA's analysis of this issue is set forth in a single confusing sentence:

> But the [*Gibson*] court offered no authority for the proposition that a waiver of sovereign immunity with respect to judicial proceedings—which the court conceded had occurred—does not encompass a waiver of sovereign immunity with respect to administrative proceedings before the same sovereign.

(VA's cert. petition, p. 16.) Of course, the Solicitor General cites no authority for the proposition that a waiver of sovereign immunity as to judicial proceedings *does* encompass a waiver as to administrative proceedings. The *Gibson* Court reasoned that Congress expressly conditioned its waiver of sovereign immunity for compensatory damages upon the right to a jury trial, and it is this plain limitation on the face of the statute that the VA fails to address.

The *Gibson* and *Fitzgerald* cases are distinguishable. While the opinions are not completely harmonious, the conflict is not great, and is largely explained by the failure of the parties in *Fitzgerald* to raise the issue of sovereign immunity. Now that this issue has been raised in *Gibson* and *Crawford*, other courts will address it, increasing the likelihood of a correct resolution if and when this Court decides to hear it. *Cf.*, *Brown v. Texas*, ___ U.S. ___, 118 S. Ct. 355, 356-57 (1997) (opinion of Stevens, J., respecting denial of certiorari). This Court should deny the petition for a writ of certiorari.

III. The opinion in *Gibson* does not "open the floodgates" to litigation

The Solicitor General raises the specter of thousands of additional cases in federal court if the EEOC is not permitted to award compensatory damages. (VA's cert. petition, p. 13.) Several observations should be made. First, the Solicitor General does not state the number of complainants actually awarded compensatory damages, preferring to use the vague term "often." *Fitzgerald, Gibson* and *Crawford* are all cases in which no

provision for compensatory damages was made. It appears that the government uses the ability to award compensatory damages more often to bar victims' claims under the exhaustion doctrine than it does to award them compensatory damages.

Second, nothing in *Gibson* prohibits the EEOC or federal agencies from voluntarily offering compensatory damages to complainants in settlement, or as offers of full relief. The *Gibson* decision only prevents the EEOC from ordering compensatory damages where federal agencies would be deprived of the right to trial by jury. To the extent that the government desires to reduce congestion in the federal courts, it will be motivated to make fair settlement offers to victims of discrimination, including offers of compensatory damages.

Third, the *Gibson* decision affords no more access to federal courts than Congress provided. Section 102 of the Civil Rights Act of 1991 authorizes awards of compensatory damages in actions under section 717 of the Civil Rights Act of 1964, and section 717 permits aggrieved federal employees to file suit in federal district court. 42 U.S.C. § 1981a(a)(1); 42 U.S.C. § 717(c). Whether compensatory damages are offered voluntarily or awarded by the employing agency or the EEOC, whether compensatory damages are in the amount of zero or one million dollars, Congress has granted access to federal court for every federal employee who believes he or she is aggrieved by an order of an administrative agency.

The federal district courts will not be inundated with federal EEO claims. In a few cases, the government will lose the defense of failure to exhaust administrative

remedies, unless Congress decides to waive sovereign immunity and subject federal agencies to compensatory damage awards without recourse to jury trials. There is nothing unjust or disproportionate in this. Congress has said that compensatory damages should be awarded in jury trials, and so it should be. The government should not be shocked to be treated like all other employers.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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